

1 COOLEY LLP
MAZDA K. ANTIA (214963)*
2 (mantia@cooley.com)
MARY KATHRYN KELLEY (170259)
3 (mkkelley@cooley.com)
4401 Eastgate Mall
4 San Diego, CA 92121
Telephone: (858) 550-6000
5 Facsimile: (858) 550-6420

6 **admission pending*

7 CALIFORNIA PLANNED PARENTHOOD
EDUCATION FUND
8 MAGGY KRELL (226675)
(Maggy.Krell@ppacca.org)
9 555 Capitol Mall, Suite 510
Sacramento, CA 95814
10 Telephone: (916) 446-5247
Facsimile: (916) 441-0632

11 Attorneys for Plaintiff
12 California Planned Parenthood Education Fund

13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA
15

16 California Planned Parenthood Education
17 Fund,

18 Plaintiff,

19 v.

20 U.S. Department of Health and Human
21 Services,

22 Defendant.

Case No.

COMPLAINT

1 1. Plaintiff California Planned Parenthood Education Fund (“CPPEF”) brings this action
2 against defendant U.S. Department of Health and Human Services (“HHS”) to compel HHS to comply
3 with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) and immediately process and release
4 requested documents related to proposed changes to Title X of the Public Health Service Act, 42
5 U.S.C. §§ 300-3001-8.

6 2. Pursuant to FOIA, on August 1, 2018, CPPEF requested certain documents from HHS
7 regarding the proposed rule titled “Compliance with Statutory Program Integrity Requirements” (RIN:
8 0937-ZA00), issued by HHS and published in the federal register on June 1, 2018. (Exhibit A.) The
9 proposed rule sets forth dramatic changes to the Title X family planning program that if implemented
10 will have a far-reaching and devastating impact on CPPEF’s clients including California’s most
11 vulnerable women.

12 3. CPPEF received a response from HHS that same day acknowledging receipt and
13 designating the request “Case Number 2018-01332-FOIA-OS.” (Exhibits B-C.)

14 4. On September 24, 2018 – nearly two months after HHS acknowledged receiving the
15 request – and after HHS’s statutory and regulatory deadline to respond had passed – HHS sent CPPEF
16 a letter seeking clarification of CPPEF’s request. (Exhibit D.) CPPEF promptly responded four days
17 later and provided the requested clarifications. (Exhibit E.)

18 5. Since then, CPPEF has inquired twice on the status of its FOIA request, once in
19 November 2018 (Exhibit F) and once in January 2019 (Exhibit G). HHS failed to respond to either
20 inquiry and has not produced a single responsive document. Indeed, more than six months after
21 CPPEF submitted its request, HHS’s FOIA’s website still lists the status of the request as “Assigned
22 for Processing.” (Exhibit H.)

23 6. HHS has thus far exceeded the twenty working day statutory and regulatory time limits
24 to respond. *See* 5 U.S.C. § 552(a)(6)(A)(i); 552(a)(6)(E)(ii)(I). Accordingly, CPPEF respectfully
25 requests that this Court issue an order (i) compelling HHS to process CPPEF’s request immediately
26 and produce responsive documents and (ii) enjoining HHS from assessing fees for processing the
27 request.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), as the district court of the United States in the district in which the complainant resides and has its principal place of business, and 28 U.S.C. § 1331.

8. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e). This is a civil action against an agency of the United States, and venue is therefore proper where CPPEF resides as no real property is involved in the action.

PARTIES

9. Plaintiff California Planned Parenthood Education Fund is a not-for-profit organization whose mission is to provide comprehensive reproductive and complementary health care services, educational reproductive and sexual health programs and advocacy for policies that ensure access to health services. CPPEF and its sister organization Planned Parenthood Affiliates of California represent seven Planned Parenthood affiliates in California that collectively operate 115 health centers and satellite health centers and serve roughly 862,000 patients per year that are unique to each health center.

10. Defendant U.S. Department of Health and Human Services is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1), and is headquartered in Washington, D.C. HHS has possession, custody and control of the records to which CCPEF seeks access.

FACTUAL ALLEGATIONS

11. In 1970, Congress enacted Title X of the Public Health and Service Act (the “Act”), 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a-6, which provides federal funding for family-planning services. The Act authorizes the Secretary of HHS to “make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services.” 42 U.S.C. § 300(a). All Grants and contracts under Title X must “be made in accordance with such regulations as the Secretary may promulgate.” 42 U.S.C. § 300a-4(a). There is a crucial need for Title X services in California where there are over two million uninsured people.

12. On June 1, 2018, the federal register published a proposed rule issued by HHS titled “Compliance with Statutory Program Integrity Requirements” (RIN: 0937-ZA00). The proposed rule sets forth significant changes to the Title X family planning program. On February 22, 2019, the proposed rule was finalized and published.

13. The proposed changes to the Title X program will have grave consequences on public health and severely limit access to contraceptive care. The rule will particularly affect the health of poor women, communities of color and rural communities, as the rule would significantly interfere with their access to reproductive healthcare and family planning. In particular the proposed rule will limit the availability of all 18 FDA-approved methods of contraception for women, giving preference to fertility awareness and natural family planning clinics, as well as defunding sites that provide abortion services and counseling.

14. Given the dramatic impact of the proposed changes, on August 1, 2018, CPPEF submitted a FOIA request to HHS, which is attached as Exhibit A. The FOIA request seeks records regarding the justification for the changes to the rule and the process of finalizing the rule. In particular, the request seeks records related to the process of receiving, tracking, grouping and determining whether to publicly display comments submitted in response to the proposed rule. (Requests 1-7)

15. The request also seeks records related to the process of developing and drafting the proposed rule including:

- records related to HHS’s conclusions regarding the impact of the proposed rule on patients (Request 8);
- names and professional affiliations of medical providers consulted in developing the proposed rule (Request 9);
- records related to communications between HHS and other persons or groups concerning creating or drafting the proposed rule (Request 10);
- HHS employees involved in drafting, reviewing or discussing the proposed rule (Request 11);
- data, documents, evidence or information relied on by HHS in considering “the

effectiveness of its policies enforcing statutory mandates” as referenced in the proposed rule (Request 12);

- data, documents, evidence or information relied on by HHS in its proposal to “amend the definition of ‘low income family’ to include women who are unable to obtain certain family planning services under employer-sponsored health insurance policies due to their employers’ religious beliefs or moral convictions” (Request 13);
- data, documents, evidence or information relied on by HHS in its proposal to include non FDA approved methods within “effective family planning services” eligible for funding (Request 14);
- data, documents evidence or information relied on by HHS in creating and proposing the Regulatory Impact Statement of the proposed rule (Request 15);
- studies, evidence or other materials not cited in the proposed rule, that HHS considered in proposing it (Request 16).

16. HHS responded the same day that CPPEF submitted its request acknowledging receipt and designating the request “Case Number 2018-01332-FOIA-OS.” (Exhibits B-C.) CPPEF heard nothing further until September 24, 2018, nearly two months later, when HHS sought clarification of CPPEF’s request. (Exhibit D.) HHS’s clarification request focused on four of CPPEF’s 16 requests. For these, HHS asked CPPEF to provide specific search terms and timeframes, and to identify the names of specific HHS employees and domain names of email addresses. CPPEF promptly responded on September 28, 2018 with the requested information. (Exhibit E.)

17. Since HHS requested clarification on September 24, 2018, it has not contacted CPPEF at all. HHS has not only failed to respond to the substance of CPPEF’s FOIA request, but HHS has not produced a single responsive document. HHS has also completely ignored CPPEF’s inquiries into the status of its request. CPPEF, on the other hand, has continued to request that HHS comply with its statutory duties. On November 16, 2018, for instance, CPPEF asked, “whether [HHS] had an anticipated timeline for responding to [CPPEF’s] FOIA request.” (Exhibit F.) HHS did not respond. In January 2019, CPPEF wrote to HHS again, noting that HHS had not responded to CPPEF’s

1 November inquiry and reminding HHS that CPPEF's FOIA request has been outstanding and
2 unanswered since August 1, 2018. CPPEF concluded by asking HHS to "[p]lease let [us] know where
3 you are at in the process and when you anticipate completing this request." (Exhibit G.) More than a
4 month has since passed and CPPEF's inquiry has again been met with silence. What is more, it has
5 been over six months since HHS received CPPEF's original August 1, 2018 FOIA request and HHS's
6 FOIA website still lists the status of the request as "Assigned for Processing." A screenshot of the
7 status of the request as listed on HHS's FOIA website is attached as Exhibit H.

8 18. By any measure, HHS's response to CPPEF's FOIA request is long overdue. Under
9 FOIA an agency must determine whether to comply with the request within twenty days (excluding
10 weekends and legal holidays). *See* 5 U.S.C. § 552(a)(6)(A)(i). It has been more than six months since
11 CPPEF's initial August 1, 2018 request and nearly five months since CPPEF provided the clarification
12 requested by HHS. As of the filing of this Complaint HHS has not provided a response to CPPEF's
13 FOIA request nor has it produced a single responsive document.

14 19. Thus, HHS has failed to comply with the time limits imposed by the FOIA statute and
15 the applicable HHS regulations and CPPEF, for its part, has exhausted all administrative remedies *See*
16 5 U.S.C. § 522(a)(6)(C)(i). Accordingly, HHS must be compelled to comply with FOIA and
17 immediately process and release the requested information.

18 20. Further, the fees for responding the FOIA request should be waived. Under FOIA, an
19 agency "shall not assess any search fees" if the agency fails to respond to a request for documents
20 within the time frame required by the statute. 5 U.S.C. § 552(a)(4)(A)(viii)(I). HHS's own regulations
21 require HHS to respond within 20 days or to waive search fees. 45 C.F.R. §5.53(d)(1) ("If [HHS]
22 fail[s] to comply with the FOIA's time limits in which to respond to a request, [HHS] may not charge
23 search fees").

24 21. Fees should also be waived or reduced pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)-(iii)
25 and 45 C.F.R. § 5.54 because disclosure in this case is (1) in the public interest because it is "likely to
26 contribute significantly to public understanding of the operations or activities of the government" and
27 (2) "not primarily in the commercial interest of the requester." This standard under the FOIA is "to
28

1 be liberally construed in favor of waivers for noncommercial requesters” like CPPEF. *McClellan*
 2 *Ecological Seepage Situation v. Cartucci*, 835 F.2d 1282, 1284 (9th Cir. 1987).

3 22. First, the disclosure CPPEF seeks is in the public interest. The requested records
 4 pertain to the operations and activities of the federal government and their disclosure will ensure
 5 transparency in HHS’s process of attempting to modify a system that has been relied upon by millions
 6 of people to access family planning information and services. Disclosure in response to this request
 7 would certainly “contribute significantly to public understanding” of HHS’s operations. 5 U.S.C. §
 8 552(a)(4)(A)(iii).

9 23. Second, disclosure is not in CPPEF’s commercial interest. CPPEF is a not-for-profit
 10 organization whose mission is to provide educational reproductive and sexual health programming,
 11 complementary health care services, and advocacy for policies that ensure access to health services.
 12 The purpose of the request is to monitor and evaluate government operations with respect to a public
 13 health program that currently serves millions of people. Depending on the content of the records
 14 disclosed, CPPEF may disseminate the information to the public, and if so, will provide the
 15 information at no cost.

16 24. Disclosure in response to CPPEF’s request is in the public interest and not primarily in
 17 CPPEF’s commercial interest, accordingly, HHS should furnish the requested records “without any
 18 charge or at a charge reduced below the fees established.” 5 U.S.C. § 552(a)(4)(A)(iii).

19 **CLAIMS FOR RELIEF**
 20 **COUNT ONE**
 21 **(VIOLATION OF FOIA, 5 U.S.C. § 552)**

22 25. CPPEF incorporates by reference the foregoing paragraphs as if fully set forth herein.

23 26. On August 1, 2018, CPPEF submitted a request under FOIA to HHS, an agency of the
 24 United States for records in HHS’ possession, custody and control. HHS acknowledged receipt on
 25 August 1, 2018 and subsequently sought clarification on September 24, 2018, which CPPEF promptly
 26 provided on September 28, 2018. HHS has failed to respond substantively or produce a single
 27 document within the statutory deadlines. Thus, HHS has violated FOIA and CPPEF has exhausted its
 28 administrative remedies.

27. By failing to respond to CPPEF's request within the statutorily prescribed time limit, HHS has violated its duties under 5 U.S.C. § 552 and its own regulations implementing FOIA at 45 C.F.R. §§ 5, et seq. These duties include, but are not limited to, the duties to process CPPEF's request expeditiously and as soon as practicable; to notify CPPEF of its determination and justifications; to conduct a reasonable search for responsive records; and to produce non-exempt responsive records.

PRAYER FOR RELIEF

WHEREFORE, CPPEF requests that this Court:

28. Order HHS to immediately conduct a thorough search for any and all records responsive to CPPEF's FOIA request using search methods reasonably likely to lead to discovery of all responsive records;

29. Order HHS to immediately process and release any responsive records in their entirety and make copies available to CPPEF;

30. Enjoin HHS from charging CPPEF search, review or duplication fees for the processing of its request;

31. Award CPPEF its costs, attorneys' fees, and other disbursements for this action under 5 U.S.C. § 552(a)(4)(E)(i); and

32. Grant any other relief this Court deems just and proper.

Dated: February 26, 2019 COOLEY LLP

By: /s/ Mary Kathryn Kelley

Mary Kathryn Kelley

CALIFORNIA PLANNED PARENTHOOD
EDUCATION FUND

By: /s/Maggy Krell

Maggy Krell

Attorneys for Plaintiff
California Planned Parenthood Education Fund